HO SIEW CHOONG

v.

ON-KWARD REALTY SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD SAARI YUSOFF J
[CIVIL NO: S2-22-39-98]
29 JUNE 2000

TORT: *Nuisance - Defendant cutting off water supply - Whether constituted nuisance*

TORT: *Nuisance - Defendant cutting off water supply - Nature of damages to be awarded*

The plaintiff, the owner of an apartment ('the apartment') situated in a resort ('the resort') brought an action against the defendants. The first defendant was the developer of the resort while the second defendant was appointed by the first defendant to manage and maintain the common properties, facilities and services of the resort which consisted of three blocks.

The plaintiff alleged that the defendants had cut off the water supply. The plaintiff now prays for an injunction that the defendants reconnect the water supply to the said apartment and thereafter, an injunction that the defendants be restrained from shutting off the water supply to the apartment so long as the plaintiff makes full payments of his apportioned share of the water charges to the said apartment.

In their counter-claim, the defendants prayed for a declaration that the plaintiff is liable to pay RM0.21 per sq. ft. as maintenance fees instead of the RM0.16 the plaintiff has been paying and an order that the plaintiff pays the defendants the sum of RM2,554.98 being the overdue maintenance fees.

The issues for consideration were: (i) whether the cutting off of the water supply to the said apartment by the defendant constituted a nuisance. If so whether the plaintiff was entitled to damages; and (ii) whether the new maintenance charges imposed by the defendants at the rate of RM0.21 per sq. ft. was fair and justified.

Held:

[1] Nuisance consists of an interference with the enjoyment of property falling short of physical interference and without causing physical damage. Although the amount of the damages recoverable for such nuisance may be hard to quantify, even in the absence of injury to health as a result of nuisance, the court will endeavour to quantify damages for inconvenience and distress suffered.

[1a] It is not in dispute that the plaintiff was deprived of water supply for a period of over two months due to the act of the second defendant, which tantamounts to the second defendant interfering with the enjoyment of the said premises by the plaintiff. The second defendant's act in cutting off the water supply to the said apartment constituted nuisance.

[1b] Since the plaintiff suffered inconvenience and distress when he had to cancel his plans due to the second defendant's act in cutting off the water supply, damages in the sum of RM1,000 is awarded.

[2] On the dispute over the new maintenance charges, the burden is on the defendants to justify the claim by proving that the income derived from the maintenance charges based on the existing rate is insufficient to meet the cost of maintenance of the resort. As shown by the documentary evidence, there was no shortfall in the income *vis-a-vis* the cost of maintenance. On the contrary the figures in the reports and accounts suggest otherwise. The defendants therefore had failed to justify the claim.

[Judgment for the plaintiff.]

Other source(s) referred to:
David Elvin & Jonathan Karas, *Unlawful Interference With Land*, p 240

For the plaintiff - MV Kumar; M/s MV Kumar
For the defendants - Jeremy CH Yong; M/s Azman, Davidson & Co

Reported by Mariette Peters-Goh

JUDGMENT

Mohd Saari Yusoff J:

In his statement of claim, the plaintiff prays for the following:

1.1 an injunction that the defendants, its agents and/or servants reconnect the water supply to the said premises;

1.2 thereafter, an injunction that the defendants, its agents and/or its servants be restrained in anyway whatsoever from shutting off the water supply to the said premises so long as the plaintiff makes full payment of his apportioned share of the water charges to the said premises;

1.3 special damages as prayed for in the statement of claim;

1.4 general damages as this Honourable Court deems just and reasonable;

1.5 costs; and

1.6 interest on the judgment sum at the rate of 8% per annum from the date this Honourable Court deems fit to the date of full payment and/or realisation.

In the counter-claim, the defendants pray for the following:

2.1 a declaration that the plaintiff is liable to pay RM0.21 per sq. ft. as maintenance fees instead of the RM0.16 the plaintiff has been paying;

2.2 an order that the plaintiff do pay the defendants the sum of RM2,554.98 being the overdue maintenance fees;

2.3 contractual rate of interest at 12% per annum on all outstanding sums due; and

2.4 costs.

Background

The plaintiff is the owner of an apartment A-2-5 ("the said premises") in a development known as Bayu Beach Resort Port Dickson ("the said resort"). The 1st defendant is the developer of the said resort. The 2nd defendant was appointed by the 1st defendant to manage and maintain the common properties, facilities and services of the said resort which consisted of three blocks.

The plaintiff entered into a sale and purchase agreement dated 29 January 1992 with the 1st defendant and another for the purchase the said premises. Further, on 21 September 1992 the same parties entered into a management agreement in respect of the management and maintenance of common properties, facilities and services of the said resort.

Issues

The following are for determination:

a i) Whether the cutting off water supply to the said premises by the defendant constitutes a nuisance. If so, whether the plaintiff is entitled for damages.

ii) Whether the new maintenance charges imposed by the defendants at rate of RM0.21 per sq. ft. was fair and justified.

b

The agreed facts in this case are as follows:

6.1 It is an express or implied term that it shall be the duty of the defendants to supply water to the said premises. The defendants would normally purchase the water from the Jabatan Bekalan Air in bulk and subsequently apportion payment of the water supply to each parcel in accordance to the reading of the respective parcel water meter;

c

6.2 On or about 29 September 1993, the plaintiff paid to the 1st defendant the deposit for water and electricity of RM300 and RM500 respectively;

d

6.3 Pursuant to cl. 18 in the sale and purchase agreement and 8.07 in the management agreement, the plaintiff was required to pay maintenance charges in respect of his proportion of cost of the management and maintenance of common properties, facilities and services of the said resort;

e

6.4 *Vide* the letter dated 29 September 1994, the 1st defendant informed the plaintiff that the maintenance charges payable by the plaintiff would be revised from RM0.16 to RM0.21 with effect from 18 August 1994;

6.5 By reason of the plaintiffs non-payment of the full RM0.21, the water supply to the said premises was disconnected on or before 22 November 1997.

f

On First Issue

g On liability, I find the following in *Unlawful Interference With Land* by David Elvin and Jonathan Karas illuminating and constructive, which states at p. 240:

> Some nuisance consist in an interference with the enjoyment of property falling short of physical interference and without causing physical damage,
h for instance the nuisance may consist of noise of smell. The amount of the damages recoverable for such nuisances may be hard to quantify. However, even in the absence of injury to health as a result of the nuisance, the Court will endeavour to quantify damages for the inconvenience and distress suffered (*Halsey v. Esso Petroleum Co. Ltd* [1961] 1 WLR 682). In the case of *Bone v. Seale* ([1975] 1 WLR 797) the Court of Appeal considered the
i assessment of damages for the inconvenience caused over a long period by a nuisance consisting of the smell from the defendant's pig farm.

On quantum, the learned writers in that book at p. 238 states as follows:

> The general principle for the award of damages for a nuisance is the same as in the case of other torts, namely the Court will award –
>
> > that sum of money which will put the party who has been injured, or who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. (*Livingstone v. Rawyards Coal Co.* [1880] 5 App. Cas. 25, 39, per Lord Blackburn).

Turning to the instant case, it is not in dispute that the plaintiff was deprived of water supply for period from 22 November 1997 to 13 February 1998 due to the act of the 2nd defendant, which tantamounts to the 2nd defendant interfering with the enjoyment of the said premises by the plaintiff. In adopting the reasoning as stated in the text cited above, on this issue, I hold that the 2nd defendant's act in cutting off the water supply to the said premises constituted nuisance.

The plaintiff and his family did not use the said premises as a dwelling house but used it as a retreat. It is not in dispute that for the period from 22 November 1997 to 13 February 1998, no running water was supplied to said the premises, hence the plaintiff was not able to use it.

On consumption of water, based on the records (p. 68 of bundle "B"), the plaintiff only used a total of seven units of water from November to December 1995 and three units from November to December 1996. There was no consumption during month of January and February 1996 and 1997. At the time of his visit to the premises on 22 November 1997, the plaintiff planned to stay. He suffered inconvenience and distress when he had to cancel his plan due to the 2nd defendants act in cutting off the water supply. Taking into consideration the foregoing facts, I award RM1,000 as general damages. With regard to claim for special damages, as the defendants have failed to prove, I make no order under this head.

On second issue

The plaintiff has no objection on the existing maintenance charges of RM0.16 per sq. ft. pursuant to clause 18 of SPA read together with cl. 8.07 of management agreement. The dispute is over the new maintenance charges.

In a letter dated 24 June 1994 (p. 51 of bundle B), the defendant informed the plaintiff about the new maintenance charges of RM 0.21 per sq. ft. which was to take effect from 18 August 1994.

In this regard, it is pertinent to refer to cl. 18 of SPA which *inter alia* states:

18. Payment of service charges

(1) The Purchaser shall be liable for and shall pay the service charges for the maintenance and management or the common property and for the services provided by the Vendor prior to the establishment of a management corporation under the Strata Titles Act 1985.

(2) From the date the Purchaser takes vacant possession of the said Parcel, the Purchaser shall pay a fair and incurred amount for the maintenance and management of the common property and for the services provided. Such amount payable shall be determined according to the Vendor's Architect. The Purchaser shall pay one month's deposit and one month's advance in respect of the service charges and payment thereafter shall be payable monthly in advance.

On cost of maintenance; as evidenced by the 2nd defendant's letter dated 1 June 1994 (p. 1 bundle "E") as confirmed by Bayu Beach Resort Sdn Bhd (BBR), the 2nd defendant agreed to pay the amount as stated under respective service below:

Re: Services For Bay Beach Management Services Sdn Bhd

We wish to confirm the following services provided by Bayu Beach Resort Sdn Bhd (BBR) to Bayu Beach Resort Management Services Sdn Bhd (BBRMS).

A. Housekeeping

BBR will ensure that:

(i) public areas are clean and garbage is disposed regularly; and
(ii) the beach front is clean at all times.

In consideration of the above BBRMS will pay BBR RM60,000 per annum. This includes the cost of labour, tools and chemicals.

B. Security services

BBR will provide:

(i) security personnel 24 hours who will be stationed at the electronic gate, entry and exit points to the Bayu Beach Resort Condominium Blocks; and
(ii) security personnel to survey the Condominium Blocks 24 hours a day.

In addition, BBR will adopt a security clocking system for BBRMS.

In consideration of the above BBRMS will pay BBR RM84,000 per annum.

C. Maintenance

(i) BBR will provide all routine maintenance work on electrical, water and drainage system, public fencing including replacement of bulbs, lifts, swimming pool and routine repairs etc;

(ii) Separate bill will be issued for consumable items or parts replaced which are not included in item C(i) above;

(iii) All other work will be charged separately.

In consideration of the above BBRMS will pay BBR RM96,000 per annum

D. Administration and Bookeeping Services

BBR will:

(i) provide bookeeping services;

(ii) keep account of all authorised transactions; and

(iii) provide administrative services for day to day operations.

In consideration of the above BBRMS will pay BBR RM36,000 per annum.

E. Gardening/Landscaping

BBR will:

(i) maintain and upkeep existing landscape at the Public Area;
(ii) Provide all necessary fertilisers for the above purpose; and
(iii) Provide for beautification and additional landscaping from time to time with receipts of payment.

In consideration of the above BBRMS will pay BBR RM36,000 per annum.

Please acknowledge your agreement below. Thank you.

Yours faithfully,
Bayu Beach Resort Management Services Sdn Bhd

Sgd.
Chong Moo Ling
Managing Director

Sgd.
...
I, Lau Cheong Leong on behalf of Bayu Beach Resort Sdn Bhd agree to the above term and conditions.

If the figures as stated in the said letter (p. 1 bundle "E") were to be accepted, it follows, therefore, that the cost of maintenance of the said resort including the said premises would be RM312,000 annually. By dividing RM312,000 with the total floor area of the said resort, it would give the cost of maintenance per sq. ft. However, no evidence is led as to total floor area of the said resort. In the case of the said premises, the floor area is 830 sq. ft. in area.

In instant case, in looking at the reports and accounts in bundle "C" I note that the income derived from maintenance charges for 1995 onwards are as follows:

Year ending 30 June 1995RM342,085.27
Year ending 30 June 1996RM548,549.88
Year ending 30 June 1997RM533,456.98
Year ending 30 June 1998RM352,099.43

Reports and accounts for period prior to 1995 are not tendered, although the new rate of maintenance charges was supposed to be effective from 18 August 1994.

The burden is on the defendants to justify the claim by proving that the income derived from the maintenance charges based on the existing rate is insufficient to meet the cost of maintenance of the said resort. Here, as shown by documentary evidence, there is no shortfall in income (bundle "C") *vis-a-vis* the cost of maintenance (p. 1 bundle "E"). On the contrary, the figures in the reports and accounts (bundle "C") suggest otherwise. As the defendants have failed to justify the claim, on this issue, the defendants' case must fail.

In the premise and for reasons as alluded above, I enter judgment for the plaintiff and dismiss the counter-claim. On prayer 1.4 in the statement of claim, I order defendants to pay the plaintiff RM1,000 as general damages. I make no order on prayer 1.1. and 1.2 as the plaintiff is not proceeding with it since the 2nd defendant had reconnected the water supply. Cost to the plaintiff.